NO. 20525

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES H. TRIPP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On October 31, 1962, the Federal Grand Jury for the Southern District of California returned an indictment in 26 counts (3923-ND) charging James H. Tripp and Samuel J. Bradford with violations of Title 18, United States Code, Sections 2, 371, and 1010. (Aiding and Abetting, Conspiracy, and False Statement in FHA Transaction.) [C. T. 184-216][1/]

On July 10, 1963, the Federal Grand Jury for the

1/ "C. T." refers to Clerk's Transcript.

Southern District of California returned a superseding indictment in 26 counts (No. 3994-ND) charging the defendant James H. Tripp with violations of Title 18, United States Code, Sections 371 and 1010. (Conspiracy and False Statement in FHA Transaction.) On December 9, 1963, the defendant entered his plea of not guilty to all counts. On April 28, 1964, after 8 days of jury trial before the Honorable Myron D. Crocker, a mistrial was declared because of the death of the defendant's father. [C. T. 2-34, 220-221]

On January 26, 1965, jury trial began before the Honorable Myron D. Crocker and on February 5, 1965, the jury found the defendant guilty as to all counts, except numbers 15, 17, 21 and 23. On April 5, 1965, the defendant was sentenced on Count One to a fine of $10,000 and a one-year period of incarceration; a fine of $1,000 and a one-year period of incarceration, to be served concurrently with the incarceration imposed on Count One, was imposed on each of the remaining counts. Thus, the total fine laid was $31,000 and the total period of incarceration imposed was one year. The trial court suspended the execution of the one-year period of incarceration on condition that the fine imposed be paid within 60 days, which condition the defendant apparently satisfied by payment in full on July 14, 1965. [C. T. 174-175, 222] The defendant was evidently not placed on probation. [C. T. 134-135, 173, 221-222; R. T. 1064-1066][2/]

2/ "R. T. refers to Reporter's Transcript.

A Notice of Appeal was filed on April 5, 1965.

The jurisdiction of the United States District Court for the Southern District of California was based on Title 18, United States Code, Sections 371, 1010, and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND RULES INVOLVED

A. Statutes:

Title 18, United States Code, Section 371, reads in pertinent part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

Title 18, United States Code, Section 1010, reads in pertinent part as follows:

> "Whoever ... for the purpose of influencing in any way the action of such [Federal Housing]

Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, ... shall be fined not more than $5,000 or imprisoned not more than 2 years, or both."

III

STATEMENT OF THE CASE

QUESTIONS PRESENTED

In order to avoid needless repetition, the appellee will analyze the propositions presented by the appellant's brief in the following order:

(A) May a separate offense be charged under 18 United States Code, Section 1010 for each false document submitted to the F. H. A. on behalf of each individual purchasing or refinancing a home? The indictment does not contain duplicitous counts.

(B) The appellant failed to renew his motion for acquittal at the conclusion of all of the evidence and therefore has waived his right to have the evidence reviewed on appeal.

(C) The evidence is clearly sufficient to sustain the conviction.

(D) The testimony of witnesses Julia Cardona, Johnny Mack Galbraith, Reola Coleen Branum, and Johnny Rosemond are clearly material and the motion to strike it was properly denied.

(E) No objection having been made to the testimony of Mr. Bradford regarding his plea of guilty, no error can now be claimed.

(F) Counts sixteen and nineteen are not defective for failure to use the words "willfully and knowingly."

(G) Counts Four and Twenty-Four of the Indictment state an offense against the United States.

(H) The prosecuting attorney committed no error in closing argument.

(I) The purpose of the conspiracy was to obtain federally insured loans and continued after March, 1962.

IV

STATEMENT OF FACTS

During the latter part of 1961 and 1962 defendant James H. Tripp was the president and owner of Tripp Land Company in Fresno, California. The defendant was engaged in the business of constructing and selling homes in the $10,900 to $13,900 price range at two tracts known as King Homes and Regent Homes. [R. T. 61, 228-229, 504-505]

Mr. Samuel J. Bradford was employed by the defendant from July of 1961 until June of 1962. His function was to furnish the real estate brokers license and to see that the paper work was packaged for loans. Mr. Bradford, who was not familiar with FHA rules and regulations, had the defendant's power of attorney.

[R. T. 306, 316, 398, 503-506, 510, 584, 713-714]

T. J. Bettes Company agreed to make loans on the Regent and King Homes tracts subject to FHA insuring the loans. It was agreed that Tripp Land Company, through its officers and employees, would furnish the required information to T. J. Bettes Company concerning prospective purchasers and home owners who wished to refinance their loans. T. J. Bettes Company officers and employees would then prepare the appropriate documents and submit them to the Fresno Office of the FHA. T. J. Bettes Company relied upon the information provided by Tripp Land Company as did the FHA. [R. T. 28-29, 32-34, 49, 52, 55, 58, 63-64, 69-71, 89, 136, 147-148, 190-192, 230, 240-241, 261]

The defendant, during the latter part of 1961, had encountered serious financial difficulties. The defendant held many second trust deeds on homes he had previously sold in the Regent Homes Tract. [R. T. 517]

The defendant, during the latter part of 1961 and early 1962, caused false statements, which are described later in this section of this brief, to be submitted to T. J. Bettes Company, realizing that the false statements would be submitted by T. J. Bettes Company to the FHA in Fresno, California. [R. T. 513-514, 520, 593]

Customarily the FHA required a 3% down payment, and reflecting this requirement as to the homes involved in this case, the defendant's billboard advertisements stated that a $400 down payment was required. [R. T. 319-320, 391-392]

In the normal course of business, salesmen at the Regent and King Homes tracts would accept a deposit from the home buyer or the individual who wished to finance a home. These deposits were then transmitted to the defendant. In no case did the deposits exceed $200, and normally they were less than $50. [R. T. 370, 507, 589-590] As to each person who intended to purchase a new home or refinance a home previously purchased, the defendant maintained separate files indicating the down payment actually made. [R. T. 238, 380-382, 507-508, 510]

Both the defendant and Mr. Bradford took the individual sales documentation to the offices of T. J. Bettes Company. The documentation as to each individual sale which was taken into the offices was in many instances materially false, as subsequently will be described. [R. T. 61, 236, 513-514, 593]

Before these documents were submitted by T. J. Bettes Company to the FHA in Fresno, both the defendant and Mr. Bradford went through the T. J. Bettes Company files paper by paper. The defendant made a list of things which had to be completed as to each file. [R. T. 238, 510-511]

After the documentation had been submitted to the FHA by T. J. Bettes Company, an employee of the FHA contacted an employee of T. J. Bettes Company for additional substantiating data. An employee of the T. J. Bettes Company would then call either the defendant or Mr. Bradford and request additional substantiating data. Employees of the T. J. Bettes Company discussed in detail with the defendant the FHA requirements concerning

additional substantiating data. Within a day or two after the request for additional information, the defendant or Mr. Bradford brought the additional information required by FHA into the T. J. Bettes Company offices. The additional information that was furnished was also materially false. [R. T. 67, 69, 137, 239, 242, 264, 513-514, 520, 593]

The defendant in the latter part of 1961 told his salesmen that if the buyers of homes did not have the required down payment, they could be moved in on a rental basis. As to one particular sale which had not closed, the defendant told a salesman that he would put up the required down payment. [R. T. 711-713, 717-718]

Mr. Samuel Bradford took his instructions from the defendant. The defendant told him to furnish T. J. Bettes Company whatever they needed to close a loan. The defendant told him not to worry about the down payment or the cash-on-hand statements but rather to furnish anything to T. J. Bettes Company which was required to close a loan. [R. T. 503-504, 512-513, 680]

On one occasion Mr. Bradford prepared false statements while the defendant was out of town and submitted these false statements to T. J. Bettes Company for transmittal to the FHA. When the defendant returned to town, Mr. Bradford told him about these false statements. The defendant told him not to worry about it because the loans had to be closed at any cost. [R. T. 515-516, 607-608, 701, 703]

In the latter part of 1961 Mr. and Mrs. Jamison

purchased a home at the King Homes tract. They signed many documents in blank. The defendant caused many false statements to be made to the FHA concerning this transaction, including the following: (1) $275 had been paid by Mr. and Mrs. Jamison, Count Two, Exhibit 2-K; (2) Mr. and Mrs. Jamison had $400 cash on hand, Count Three, Exhibit 2-L; (3) Mr. and Mrs. Jamison had paid the defendant $400 cash and had $400 cash on hand, Count Four, Exhibit 2-O. [R. T. 455-459, 461-462]

In the latter part of 1961 or early 1962 Mr. Thomas Jefferson purchased a home at the King Homes Tract. He made a $5 deposit and signed many documents in blank. The defendant caused many false statements concerning this transaction to be made to the FHA, including the following: (1) that Mr. Jefferson had made a $400 deposit, Count Five, Exhibit 3-O; (2) that Mr. Jefferson paid the defendant $400 and had $400 cash on hand, Count Six, Exhibit 3-P; (3) that Mr. Jefferson had $400 cash on hand, Count Seven, Exhibit 3-M; (4) that Mr. Jefferson had saved $685, Count Eight, Exhibit 3-K; and (5) that Mr. Jefferson had paid the defendant $680, Count Nine, Exhibit 3-J. [R. T. 423, 425-427, 431-436]

Mr. Johnny Mack Galbraith purchased a King home in late 1961 or early 1962. He paid a $5 deposit and signed documents in blank. As to this transaction the defendant caused many false statements to be submitted to the FHA, including the following: (1) that Mr. Galbraith had paid $400 to the defendant and had $400 cash on hand, Count Ten, Exhibit 4-I; (2) that Mr. Galbraith had made a $400 deposit, Count Eleven, Exhibit 4-H; (3) that

Mr. Galbraith had been saving between $25 and $30 per month for the past two and one-half years, Count Twelve, Exhibit 4-D; and (4) that Mr. Galbraith had $400 cash on hand, Count Thirteen, Exhibit 4-E. [R. T. 741-746]

Mr. and Mrs. Willie Johnson purchased a home at the King Homes tract in the latter part of 1961 or early 1962. They made a $5 deposit and signed many documents in blank. The defendant caused many false statements to be submitted to the FHA concerning this transaction, including the following: (1) that Mr. and Mrs. Johnson had paid the defendant $675, Count Fourteen, Exhibit 5-I; and (2) that Mr. and Mrs. Johnson paid the defendant $400, Count Sixteen, Exhibit 5-N. [R. T. 470-474, 476-477, 490]

In August of 1960 Mr. and Mrs. Russell Sowle purchased a home in the Regent Tract. The defendant held a second trust deed on this residence in the amount of $2,000 which was being paid at the rate of $20 per month. In early 1962 this home was refinanced at the behest of the defendant. In the refinancing transaction Mr. and Mrs. Sowle made no down payments or cash payments to the defendant. The defendant caused false statements concerning this transaction to be submitted to the F. H. A., including the following: (1) that Mr. and Mrs. Sowle paid $285 to the defendant on November 7, 1961, Count Eighteen, Exhibit 6-L; and (2) Mr. and Mrs. Sowle paid the defendant $285 for closing costs, Count Nineteen, Exhibit 6-M. [R. T. 732-734, 736-737]

Mr. and Mrs. Roy Branum purchased a home in the fall

of 1960 at the Regent Homes tract; subsequent to the purchase, the home was refinanced at the behest of the defendant. The Branums also had a second trust deed on this residence on which they paid the defendant $20 per month. Concerning this refinancing transaction the defendant also submitted many false statements to the FHA, in particular, that Mr. and Mrs. Branum on October 27, 1961, paid the defendant $280, Count Twenty, Exhibit 7-N. [R. T. 778, 781-784, 786-787, 790]

Before Christmas of 1961 Mr. and Mrs. Arnulfo Cardona purchased a home at the Regent Homes tract. They made a down payment of $40. They paid $195 rent between January and June of 1962 but made no other payments. The defendants caused false statements to be made to the FHA concerning this transaction, in particular, that Mr. and Mrs. Cardona paid the defendant $685, Count Twenty-two, Exhibit 8-I. [R. T. 331-336, 348]

In the latter part of 1961 or early 1962 Mr. Charles Banks purchased a Kings Home. He made a $40 deposit and signed documents in blank. The defendant caused false statements concerning this transaction to be submitted to the FHA, including the following: (1) that Mr. Banks paid the defendant $675, Count Twenty-Four, Exhibit 9-N; (2) that Mr. Banks made a deposit of $400, Count Twenty-Five, Exhibit 9-M; and (3) that Mr. Banks paid the defendant $675, Count Twenty-Six, Exhibit 9-K. [R. T. 407-408, 410-411, 413-420]

After the nine home transactions were submitted to the

FHA for approval in the latter part of 1961 and early 1962, the federal government began an investigation into the Tripp Land Company. Once the investigation began the defendant, along with Mr. Bradford, in an effort to insure the success of their scheme and in furtherance of the conspiracy prepared false records and attempted to convince home purchasers to lie to the FHA and F. B. I.

In early 1962 the defendant and Mr. Bradford took the original files concerning the transactions we are dealing with here from the defendant's office to his home. The defendant and Mr. Bradford spent almost two days preparing false files and false receipts for payment from the purchasers and false 3 by 5 cards containing the payment record of each buyer. These files, receipts, and 3 by 5 cards were to be used to show the FBI when they came around and checked the defendant's records. [R. T. 521-530].

The defendant prepared the false files, receipts, and 3 by 5 cards from xeroxed copies of the T. J. Bettes files. The false files were last seen in the possession of the defendant's attorney. [R. T. 258-260, 521-532]

After the false documents were prepared, the defendant and Mr. Bradford began contacting the home buyers in order to convince these people to lie to the FHA and the FBI.

In February of 1962, after the FBI began their investigation the defendant and Mr. Bradford met with Mr. and Mrs. Cardona at their home. The defendant told them to go to the FHA and lie

by telling the FHA that they had made their down payments. The defendant also had Mr. Cardona endorse a check made payable to the defendant. Ironically, Mr. and Mrs. Cardona did not even have a bank account at this time. [R. T. 336-338, 340, 537, 577-578]

In March of 1962 the defendant met with Mrs. Branum and attempted to induce her to lie to federal officials. He showed Mrs. Branum a false document that he had caused to be filed with the FHA. [R. T. 786-789]

In March of 1962 the defendant and Mr. Bradford met with Mr. Johnny Mack Galbraith. Mr. Galbraith told them about the questions he had been asked by a representative of the FHA. Another meeting was arranged the next day. At this meeting, which took place at the King Homes Tract, the defendant told Mr. Galbraith to lie to the FHA. Mr. Galbraith refused to lie to the FHA. The defendant then had Mr. Galbraith sign a check in an amount similar to the cash which had been paid according to the documents which had been furnished the FHA. The check was then burned by the defendant. The defendant then wrote out in long hand instructions for Mr. Galbraith to follow when questioned by federal agents, as follows:

"(1) A friend trying to help me, signed the letter about my saving $25 - $30 per month to buy a house.

(2) $650 was deposited to buy a King Home and returned to me after I cancelled the sale."

[Exhibit 4AA; R. T. 385-388, 542-545, 556, 657, 748-750, 757]

Around the middle of April of 1962 the defendant and Mr. Bradford met with Mr. Jefferson at the laundry where he was employed. A meeting was arranged at the defendant's office on the next day. On this occasion the defendant told Mr. Jefferson to go down to the FHA and tell them that he had actually paid $300-$400 down on the home he had purchased. The defendant also gave Mr. Jefferson phony receipts for payments that he had never made to show the FHA. Following the advice of the defendant, Mr. Jefferson went to the FHA and lied. [Exhibit 14, R. T. 423, 427-429, 442-443, 453-455, 540-541]

In April or May of 1962 the defendant told Mr. Bradford that he was depositing money in Home Title in Fresno to cover up for payments that had not been made by purchasers. In the case of the Cardonas and the Johnsons, the defendant actually made deposits at Home Title on their behalf. [Exhibits 12, 13; R. T. 340, 479, 493, 548-549]

The defendant told Mr. Bradford that he thought everything was going well with the FBI. He thought that Mr. Bradford should talk to the FBI. He told Mr. Bradford that if he and the defendant stuck together on their stories, they would be believed instead of the buyers that were talking to the FBI. [R. T. 535]

Mr. Bradford talked to Special Agent Robert Emonts of the FBI and lied to him. He then reported back to the defendant. The defendant assured Mr. Bradford that he would not be involved

and that he would take the blame if required as everything had been done at his behest in order to get the loans closed. [R. T. 535-536]

On May 11, 1962, the defendant was interviewed by Special Agent Emonts. The defendant lied to Special Agent Emonts. The defendant denied any complicity regarding false statements being submitted to the FHA. He told Special Agent Emonts that he had told Mr. Johnny Mack Galbraith to go to the FHA and tell the truth. He said that Exhibit 4AA, the instructions he had given to Mr. Johnny Mack Galbraith, was a note he made of the conversation. He had no recollection of a check-burning incident concerning Mr. Johnny Mack Galbraith. He also said that he told Mr. Jefferson to go to the FHA and tell the truth and, finally, denied any discussion with the Cardonas concerning a check. [R. T. 761, 763-768]

V

ARGUMENT

A. THE INDICTMENT DOES NOT CONTAIN DUPLICITOUS COUNTS

A separate offense under 18 U. S. C. §1010 is properly charged in separate counts alleging the submission of a false document to the FHA.

Appellant argues that certain counts of the indictment are duplicitous in that the same acts are alleged as different crimes.

It is well settled that the same act may constitute separate and distinct offenses and may be charged as such in separate counts of an indictment. Gore v. United States, 357 U. S. 386 (1957). However, appellant's contention is immaterial to the determination of this appeal since the same acts are not alleged as constituting different crimes. As appellant's quotations from the indictment indicate, each count alleges that a false statement was made by the defendant at different times and in different documents submitted to the FHA.

Appellant relies on Bins v. United States, 331 F. 2d 390 (1964) for the proposition that the indictment in this case is duplicitous. Bins, contrary to appellant's contention, holds that where separate documents are submitted to the FHA, each of which contains a false statement, the indictment is duplicitous unless each false statement (separate document) is alleged in a distinct and separate count. In the court's words:

> "The filing of each false document would constitute a crime, and each should be alleged in a separate and distinct count of the indictment."
>
> 331 F. 2d at 393.

The above-quoted language from Bins is squarely in point. On these facts, the government was required to and did separately state each false statement in separate counts. Accordingly, the indictment is not duplicitous.

In accordance with the decision in Bins, is United States v. Cuddeback, 192 F. Supp. 860 (1961), where a multi-count

indictment was held valid against a claim that it was duplicitous. Each count charged an application for a loan to a different borrower on a different date, and each application was false. In denying defendant's motion to dismiss, the court pointed out that separate false application for federal housing loans, although similar, were punishable as separate offenses and were therefore properly charged in separate counts of the indictment.

United States v. Private Brands, 250 F. 2d 554 (1957) (each false statement was a separate offense, although all related to a single contract).

See also, Ebeling v. Morgan, 237 U. S. 625 (1915) (successive cutting out of separage mail bags constitutes separate offenses although part of one course of conduct).

As appellant accurately states, 18 U. S. C. §1010 provides that publishing any false statement is punishable. The statute is framed in the singular and is clearly directed at each false statement, not to a course of conduct involving a single criminal impulse. This construction of false statement statutes has long been applied.

Berg v. United States, 176 F. 2d 122 (9th C. A. 1949); United States v. Simon, 186 F. Supp. 223 (D. C. N. Y. 1960)

The proposition relied upon by appellant, i. e., that if the same evidence is used to prove different counts, a fortiori,

the counts are duplicitous, is simply not the law. As framed in Blockkurger v. United States, 284 U. S. 299 (1932), the test of whether two offenses have been committed is whether each requires proof of a different element.

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
>
> 284 U. S. at 304 (Emphasis added)

Here, a different fact must be proved to support a conviction under each separate count, namely, the publication of a separate and distinct false statement. The same evidence does not prove different counts, contrary to appellant's contention, since each count requires proof of an entirely different document. It can not be argued that proof, for example, of appellant's false cash-on-hand statement (Count 3) would establish that he submitted a false 2004(c) form (Count 6). Of course the statements are false each time they are published, as appellant points out, but each act of making, passing uttering, or publishing, etc. is a false statement and is therefore a separate offense. See Driscoll v. United States, 346 F. 2d 324 (1st C. A. 1966).

Finally, Berg v. United States, supra, and cases cited therein, indicate a general uniform construction of false

statement statutes to penalize each individual false statement. This issue was fully discussed in an analogous case by a New York federal district court. In United States v. Simon, 186 F. Supp. 223 (U. S. D. C. S. D. N. Y., 1960), defendants moved to dismiss several counts on the ground that the same false statement was alleged in each count as a separate offense. Each count, however, alleged that the false statement was made in a separate document (different Veterans Administration forms). In rejecting appellant's contention, the court said:

> "Section 979(i) defines the crime as the presentation of any false certificate concerning any claim for payment. The filing or presentation of each false certificate is a crime in itself ... the Second Circuit has interpreted an analogous statute, 18 U. S. C. §1001, to make the unit of prosecution each false statement. United States v. Private Brands, Inc., 1957, 250 F. 2d 554 ... The decision in United States v. Private Brands, Inc., supra, is more than a simple analogy, and is buttressed by Berg v. United States (C. A. 9, 1949), 176 F. 2d 122, and cases cited therein, indicating a generally uniform construction of false statement statutes to penalize each individual false statement."
>
> 186 F. Supp. at 227.

B. THE APPELLANT FAILED TO RENEW HIS MOTION FOR ACQUITTAL AT THE CONCLUSION OF ALL OF THE EVIDENCE AND THEREFORE HAS WAIVED HIS RIGHT TO HAVE THE EVIDENCE RENEWED ON APPEAL

An examination of the record in this case fails to disclose that the appellant moved the trial court for an acquittal at the close of all of the evidence. In appellant's opening brief this point is evaded by his statement that the motion for judgment of acquittal was made but not reported. (Appellant's Brief, p. 2, footnote 1) With respect to appellant's gratuitous conclusion that "the Government does not contest this fact," we can only rely on what the transcript and record of the case reflect, namely, that neither the court's record nor the transcript of the proceedings indicates the existence of such motion.

In the absence of such a motion, it is well settled, as stated in Lucas v. United States, (C. A. 9, 1963) 325 F. 2d 867, at p. 868, that:

> "Defendant is not entitled to have this court review the record to determine whether the evidence was insufficient in the particular claimed. He did move for an acquittal at the close of the Government's case, but when that motion was denied he introduced evidence on his own behalf, thus waiving any error in that ruling. Mauding v. United States, (C. A. 9, 1953) 257 F. 2d 59; Anderson v. United States,

(C. A. 9, 1952) 253 F. 2d 419; Powell v. United States, (C. A. 9, 1930) 35 F. 2d 941. And since he did not renew the motion at the conclusion of all the evidence, he failed to secure a ruling that he could challenge on appeal. (Emphasis added) Ege v. United States, (C. A. 9, 1957) 242 F. 2d 879; Hardwicke v. United States, (C. A. 9, 1961) 296 F. 2d 24. The above holding was recently affirmed in Robbins v. United States, (C. A. 9, 1965) 345 F. 2d 930, 932."

Although this court, in its discretion, may notice errors not properly raised where failure to do so would "shock its judicial conscience and operate as a palpable miscarriage of justice," the appellee respectfully contends the facts of this case demonstrate that no such situation exists in the instant case. See Statement of Facts set forth in this brief.

C. THE EVIDENCE IS CLEARLY SUFFICIENT TO SUSTAIN THE CONVICTION

Notwithstanding appellant's failure properly to raise his questions as to sufficiency of the evidence, the following testimony when read in conjunction with appellee's statement of facts, will clearly indicate the existence of substantial evidence to support the verdict.

1. The Defendant Had Knowledge of the False Statements

---

1. The appellant hand-carried loan documents to the office of the mortgage banking concern, T. J. Bettes Company, during 1961 and 1962 which were subsequently submitted to the FHA. [R. T. 61, 236]

2. The defendant was thoroughly conversant with the contents of the mortgage loan files of respective purchasers which were submitted to the FHA.

Mr. George E. Glover, Vice President and Branch Manager of the T. J. Bettes Company testified:

"Q. Did any individual from Tripp Land Co. ever go through these files.

A. Yes.

Q. And who would go through those files from Tripp Land Company?

A. Mr. Tripp and Mr. Bradford.

* * *

Q. Now, when Mr. Tripp went through the file, would he go through it paper by paper?

A. Yes.

Q. Did he make comments concerning the file?

A. Yes.

Q. To you?

A. Yes.

Q. Now, did Mr. Tripp go through the file paper by paper prior to the time these files were originally submitted to the FHA?

A. Yes.

Q. Did there come a time when these files were placed in your office?

A. Yes, there was.

Q. Why were they placed in your office?

A. Because they were coming in so often to check them.

Q. How often would they come in? and by "they", of course, I am referring to Mr. Bradford and Mr. Tripp. How often would they come in during a particular week ...

A. It was quite often. Many times they would be in twice a day and maybe in another week they'd be in maybe once a day, every day that week and may be three times a week."

[R. T. 237-238]

Mr. Glover further testified that when the FHA requested additional substantiating information with respect to a loan application, he would in turn telephone the defendant Tripp who thereafter would bring the requested information to T. J. Bettes Co. [R. T. 242-243]

On one occasion, Mr. Glover testified, while with Mr. Tripp in Tripp's office, he copied information from 3 x 5 cards.

The information on these cards was materially false. The T. J. Bettes Co., relying on this information, forwarded it to the FHA. [R. T. 224-247] Government's Exhibit 21, a letter to the FHA concerning the purchase of a home by Mr. Arnolfo H. Cardona, reflects an example of the information copied from the 3 x 5 cards in Mr. Tripp's possession and sent to the FHA. The letter stated that Mr. Cardona has paid $35 as the balance of the down payment; $50.00, $85.00, and $75.00 as part of the closing costs; and a total of $263.00 as rent between February and April 1962. [R. T. 259] Mrs. Cardona testified that the entire payments made by herself and her husband on that home were $49.00 down payment and $195.00 in rent between January and June 1962. [R. T. 331-332]

2. The Defendant's Sole Motivation Was to Close the Loans on the Homes He Was Selling

Mr. Bradford testified that defendant Tripp instructed him:

> "... to get all the documents, anything necessary, that it would take to close these loans, anything that the loan company requested, for me to get it for them. That it was not my job to worry about the down payment that those people were paying on the closing costs; that my job was merely to package the payments and see to it that it got to the loan company for processing as quickly as possible.

Q. Did he say anything at this time, in this conversation, concerning the cash on hand statements?

A. Yes, sir.

Q. What did he say?

A. He said that it wasn't my job to worry about the cash on hand.

Q. Did he say anything on this occasion concerning the money involved?

A. Well, again, he said that it wasn't my job to worry about where the money was coming from or who was paying it."

[R. T. 512-513]

After this conversation with the defendant, Mr. Bradford testified, in late 1961 and early 1962, while the defendant was out of town, he submitted a series of letters to the T. J. Bettes Co. containing false information as to the payments made by purchasers to the Tripp Land Co. These "To Whom It May Concern" letters were thereafter submitted to the FHA. [R. T. 512-513] Mr. Bradford further testified that upon the defendant's return he informed Mr. Tripp of his actions, i. e.:

"I explained to Mr. Tripp what had happened and Mr. Tripp told me not to worry about it, that he would take care of it; that it wasn't my job to worry about it -- to worry about the company."

[R. T. 515-516; 607-608; 701, 703]

Mr. Tripp similarly advised his salesmen that if the

buyers did not have the required down payment they could be moved in on a rental basis. [R. T. 712-713] On one occasion the defendant advised a salesman that he would put up the required down payment. [R. T. 717-718]

3. The Defendant Knew of His Own Knowledge That Purchasers Were Not Making $400.00 Down Payments Although the Records Submitted to the FHA Reflected to the Contrary

Mrs. Margaret Henry, who works in a secretarial capacity at the King Homes tract of the Tripp Land Co., testified that it was part of her job to write receipts for deposits or for down payments received from a potential buyer. Mrs. Henry testified that she never received a deposit or down payment in the amount of $400.00. She further stated that the largest amount of any deposit she received was about $50.00. All of the money she received was turned over to Mr. Bradford. [R. T. 369-370]

Mr. Bradford testified that the largest amount of cash received for a down payment or deposit from a purchaser was approximately $200.00 and that he collected the money from the salesmen and secretaries and in turn delivered the money to Mr. Tripp's office. [R. T. 507]

Mr. James Roseman, a salesman for Mr. Tripp at the King Homes tract, testified that the largest down payment he ever received from a purchaser was $10.00. [R. T. 713]

The testimony of eight purchasers, Jamison, Jefferson,

Galbraith, Johnson, Smith, Branum, Cardona, and Banks, all reflects that between $5.00 and $50.00 was all that was paid as a deposit, an amount nowhere near the $400.00 reflected in their respective loan applications submitted to the FHA.

4. The Evidence Is Overwhelming As To The Extent of False Information Submitted to the FHA

In addition to the "To Whom It May Concern Letters" which contained blatantly false information, testimony respecting nine separate transactions concerning home purchasing and home refinancing were introduced into evidence.

The eight witnesses, Jamison, Jefferson, Galbraith, Johnson, Smith, Branum, Cardona, and Banks each were shown numerous exhibits from their respective files and each testified unequivocally as to the falsity of the information contained therein and submitted to the FHA. The testimony of the eight purchasers is summarized in appellee's Statement of Facts.

5. The Defendant Knowingly and Willfully Attempted to Conceal the False Statements Submitted to the FHA by Fraud and Chicanery

Mr. Bradford testified that after the FBI investigation of the instant case had commenced, the defendant, Mr. Tripp, and the witnesses clandestinely met at the defendant's home to falsely

conform the files of the Tripp Land Co. with the information submitted to T. J. Bettes Co. and the FHA. For two full days the defendant and Mr. Bradford worked at the defendant's home preparing false files, false receipts for payment from home purchasers, and false 3 x 5 cards containing the payment record of each buyer. These files, receipts, and 3 x 5 cards were to be used as a decoy to be shown to the FBI if an examination of the defendant's records occurred. [R. T. 521-530]

In addition, the defendant and Mr. Bradford contacted several home buyers in order to convince these people to fabricate the events to the FHA and the FBI. A detailed summary of this aspect of the defendant's activites is discussed in the appellee's Statement of Facts relating to the defendant's conversations in February and March 1962 with Mr. and Mrs. Cardona and with Mrs. Branum concerning what they should tell the FHA regarding their financial dealings with the defendant, and to the defendant's meetings with Mr. Johnny Mack Galbraith and Mr. Jefferson to encourage them to falsify their remarks to the FHA. The appellee's Statement of Facts also treats at greater length the defendant's instructions to Mr. Bradford prior to his interview with the FBI to the effect that if they stuck to the same stories these stories would be believed instead of the buyers' stories.

6. The Defendant's Statements Given to the FBI Were Materially Inconsistent With the Testimony Adduced at Trial Which reflected His Knowledge and Participation in the Offenses Charged.

The defendant's denial of any complicity or knowledge regarding the central issue of this case, namely, the submission of false statements to the FBI, is in direct conflict with the testimony and facts adduced at the trial, specifically:

(1) that he had carried loan application information to the T. J. Bettes Co. [R. T. 61-236]

(2) that he was thoroughly conversant with the contents of the mortgage loan file submitted to the FHA which contained false information [R. T. 237-238]; and

(3) that he received the cash collected from his agents, which never equalled the $400.00 down payment or deposit required, although the loan applications reflected the opposite. [R. T. 369-370, 507, 713]

The defendant's account of his activities after the investigation in question commenced also materially varies from the testimony of others concerning them adduced at trial. The defendant informed the FBI that he told Johnny Mack Galbraith to go to the FHA and tell the truth. Mr. Galbraith testified that Mr. Tripp attempted to induce him to tell the FHA that a friend of his

had signed a letter bearing his purported signature which has been submitted to the FHA relating the fact that Mr. Galbraith had been saving $25.00 to $30.00 per month toward a down payment. Exhibit 4(d). Additionally, Mr. Galbraith stated that the defendant gave him a check for $645.00, which he signed. The defendant thereafter immediately took the check back, tore it up, and burned the pieces. The check was to constitute Mr. Galbraith's alleged down payment on his home. When interviewed by the FBI, the defendant did not recall the incident. [R. T. 749a, 542, 545, 556, 657, 748-750] When questioned by the FBI the defendant also denied instructing Mr. Jefferson, another purchaser, to lie to the FHA. Mr. Jefferson stated that Mr. Tripp told him to tell the FHA that he had paid $300.00 down on the home, when, in truth, Mr. Jefferson had paid only a $5.00 deposit.

Finally, although the defendant once again denied any knowledge of such an incident, Mrs. Cardona testified that the defendant came to her home and asked her husband to sign a check in the amount of $685.00, informing the Cardonas that they need not worry if they did not have enough to cover the check as it would not be cashed immediately. [R. T. 339-340, 771-772]

D. THE TESTIMONY OF WITNESSES JULIA CARDONA, JOHNNY MACK GALBRAITH, REOLA COLEEN BRANUM, AND JOHNNY ROSEMOND ARE CLEARLY MATERIAL AND THE MOTION TO STRIKE IT WAS PROPERLY DENIED.

The testimony of each of the above witnesses is clearly material as to the substantive counts of the indictment as well as to reflect knowledge and intent on the part of the defendant in the commission of the crimes charged.

(a) Julia Cardona testified that on a date after the investigation by the FHA in this matter commenced, the defendant approached herself and her husband and requested them to endorse a check in the amount of $685.00 to conceal a previously submitted false statement, namely, the "To Whom It May Concern Letter" submitted to the FHA reflecting that the Cardonas had paid $685.00 to the Tripp Land Co. as down payment and closing costs on their home. [Exhibit 8-i, R. T. 335, 339]

This testimony specifically covers Overt Act No. 9, of the Conspiracy, Count No. 1, and is clearly material to reflect the defendant's knowledge of the existence of the falsity of the information submitted to the FHA and his intention to attempt to cover it up.

(b) Mr. Johnny Mack Galbraith testified that although he paid only a $5.00 deposit on his home, the "To Whom It May Concern" letter [Exhibit 4(v)] reflected that the Tripp Land Co. collected $650.00 from him. [R. T. 742] Mr. Galbraith stated

that on March 2, 1962, the defendant had him sign a check in the amount of $645.00 which the defendant immediately took back and destroyed [R. T. 749], and that the defendant requested Mr. Galbraith to tell the FHA that a friend had signed Exhibit 4(d), a statement submitted to the FHA that Galbraith had been saving $25.00 to $30.00 a month to purchase a home. Finally, the defendant wrote out Exhibit 4(aa), a note to remind Mr. Galbraith what he should tell the FHA. Exhibit 4(aa), stated: (1) a friend trying to help me signed the letter about me saving $25.00 to $30.00 per month to buy a home; (2) $650.00 was deposited to buy a King home and returned to me after I cancelled the sale. [R. T. 750]

(c) Mrs. Reola Coleen Branum testified that the defendant visited her home in March 1962, at which time he showed her Exhibit 7(j), a letter dated October 27, 1961, to the FHA reflecting that the defendant had received cash in the amount of $280.00 from the Branums for closing costs on their home. [R. T. 789] The defendant at that time informed Mrs. Branum that this letter had been sent, or was going to be sent to the FHA. The defendant explained that its purpose was to expedite the loan. In view of the fact that the letter was dated some five months before this conversation, it is reasonable to assume that the letter had been sent at that time.

The fact that the Branums executed a second trust note in no way mitigates the submission of the false document to the FHA as is argued by appellant.

(d) Finally, the testimony of James Roseman, salesman for the defendant Tripp, demonstrated that at no time during his employment did he ever receive a $400.00 down payment from any of the purchasers to whom he sold Tripp homes. On the contrary, Mr. Roseman testified that the largest amount he remembers receiving was $10.00. [R. T. 713] Mr. Roseman further testified that in October or November 1961 he had a conversation with the defendant concerning the closing of a particular sale. When Mr. Roseman informed the defendant that the delay was due to the purchaser's lack of money, the defendant instructed the witness to tell the purchaser "an old friend would loan her the money." At this juncture, the witness testified, the defendant pointed to himself. [R. T. 718]

All of the above described testimony is illustrative of the defendant's knowledge of the specific acts charged and is relevant and material to the defendant's culpability.

E. NO OBJECTION HAVING BEEN MADE TO THE TESTIMONY OF MR. BRADFORD REGARDING HIS PLEA OF GUILTY, NO ERROR CAN NOW BE CLAIMED.

An examination of the record fails to disclose that the appellant at any time objected to Mr. Bradford's testimony regarding his plea of guilty to the charges of the indictment. [R. T. 514]

As stated in Fiano v. United States, 271 F. 2d 883 (CA 9,

1959), at p. 885:

> "Apparently appellant saw nothing harmful in such evidence at the time of trial. He can not now complain, when he gave the trial court no opportunity to rule on the admissibility of those matters he now claims prejudicial to his cause. As succinctly stated by the Court in United States v. DeMarie (CA 7, 1955) 226 F. 2d 783, 778: . . . in the absence of a valid objection made at the proper time, a party may not on appeal claim that the introducing of evidence was error."

Cf.. Anthony v. United States (CA 9, 1950) 256 F. 2d 50.

F. COUNTS SIXTEEN AND NINETEEN ARE NOT DEFECTIVE FOR FAILURE TO USE THE WORDS "WILLFULLY AND KNOWINGLY"

Counts Sixteen and Nineteen are alleged to be defective for failure to use the words "willfully and knowingly". A reading on both of these counts of the indictment reflects that the defendant on certain dates uttered and published " . . . false statements which the defendant then and there well knew to be false." [Emphasis added] The charge then sets forth the false statement and concludes in the last paragraph with the phrases, "Whereas, in truth and in fact, as the defendant then and there well knew", that such were not the facts. [Emphasis added] [C. T. 204, 207]

The very phrase "which the defendant then and there well knew to be false" contains within it an implication of guilty knowledge. As stated in Grant v. United States, 291 F. 2d 746, 749 (CA 9, 1961): "It is not necessary to allege that one 'knowingly' abetted as the word abet contains within it an implication of guilty knowledge." Similarly, in the instant case it would be surplusage and redundant to allege that the defendant knowingly "knew", when the indictment clearly enunciates that he submitted false statements which he knew to be false.

As stated in Haakinson v. United States, 238 F. 2d 775, at p. 780 (CA 8, 1956):

> "We can see no legal substance in this technical contention. Under Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. A. 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.' The essence of the offense under the provision of 18 U. S. C. A., Sec. 1010 that is here involved, is making, passing, uttering or publishing any statement, knowing the same to be false, and with this being done for the purpose of influencing in any way the action of the Federal Housing Administration."

Counts Sixteen and Nineteen clearly include the charge that the defendant submitted false statements knowing them to be false. Nor was the jury misled as to the elements necessary to be

proved by the appellee with respect to Counts Sixteen and Nineteen, for the court specifically instructed the jury that they must find that the acts were done knowingly and willfully. [R. T. 1031, 1033, 1034]

G. COUNTS FOUR AND TWENTY-FOUR OF THE INDICTMENT STATE AN OFFENSE AGAINST THE UNITED STATES

Title 18 U. S. C., Section 1010 is not defective for failure to include the phrase "with intent that such loan or advance of credit be offered to or accepted by the FHA for insurance ..." The statute is written in the disjunctive and its language specifies several acts which are violations of the statute. The indictment properly charges one of the prohibited acts, namely, "Whoever for the purpose of influencing the action of the FHA, knowingly and willfully made, uttered and published ... the following false statement ... etc." This form has been approved in Gevison v. United States, 358 F. 2d 761 (CA 5, 1966), at p. 763, where the court stated:

> "... A reading of the indictment makes it plain that it meets the requirements of Rule 7(c), F. R. Criminal Procedure. It tracts the pertinent language of the statute, and apprises appellant of what he must be prepared to meet. It includes all of the essential elements of the offense and no

more is required under the statute. It is adequate for the purpose of a plea of former jeopardy and otherwise fully meets the standards required by the authorities. (Case cited omitted)

The gravamen of the offense under the applicable portion of 18 U. S. C. Section 1010 is the uttering of a false statement with the intent to influence the F. H. A. The indictment sets out the detail of the alleged false statement, that the false statement was wilfully and knowingly made and passed for the purpose of influencing the action of the F. H. A."

That this is the clear import of Courts Four and Twenty-Four under review is unmistakable. [C. T. 190, 213]

H. THE PROSECUTING ATTORNEY COMMITTED NO ERROR IN CLOSING ARGUMENT

Appellant argued that the government attorney's characterization in closing argument of the defendant's statement to the F. B. I. as being "lies" constituted prejudicial conduct so as to deny defendant a fair trial. [R. T. pp. 864-865]

It is abundantly clear that the comments of counsel are not evidence in the case. [R. T. p. 1016] The jury's responsibility of weighing the defendant's statement to the F. B. I. against the plethora of other evidence introduced at the trial was not usurped

by the government's attorney characterization of the statement. Certainly there are ample contradictions between defendant's statement and the other evidence from which the jury could draw a similar conclusion of its own. An examination of the defendant's statement vis-a-vis the other testimony is examined in Section C, subsection II of appellee's brief.

The interpretation that the defendant lied to the F. B. I. was not without foundation as is illustrated from the inconsistencies with other witnesses' testimony cited above. The court in commenting on appellant's claim stated:

> "This is his interpretation so he is entitled to do that in his argument. The jury will decide whether he did or did not. You will have to cover it in your argument. It is his interpretation and it is proper." [R. T. p. 865]

Although appellant objected to this characterization of his statement by the appellee, no motion for mistrial or request made that the jury be admonished to disregard any such argument was made by appellant. No instruction to that effect was offered by appellant, and no objection to the absence of such an instruction was interposed. Thus, if any prejudice did exist, which appellee denies, it is submitted such error should be deemed waived.

Devine v. United States (C. A. 9, 1960)
278 F. 2d 552, 556.

Patterson v. United States (C. A. 8, 1966)
361 F. 2d 632, 638.

I. THE PURPOSE OF THE CONSPIRACY WAS TO OBTAIN FHA FEDERALLY INSURED LOANS AND CONTINUED AFTER MARCH, 1962

The appellant argued that the conspiracy terminated when the F. H. A. mailed letters asking purchasers to come into its office to discuss their loans. The appellant fixed this time as March 1962. In support of this termination point, appellant argued that everything that followed it was done by the defendant to cover up the crime rather than to further it.

A plain reading of the conspiracy count of the indictment clearly indicates that all of the actions charged were directed toward the accomplishment of the expressed purpose of the conspiracy, namely, to influence the action of the FHA so as to obtain insured loans on the defendant's properties. [C. T. p. 184] The conforming of the defendant's records with those submitted to the FHA was as crucial in the scheme to influence the action of the FHA as was the original presentation of the false data. Equally important in the defendant's plan to influence the action of the FHA were his efforts to obtain the complicity of the purchasers by having them lie to the FHA if questioned.

The case of Kruelwitch v. United States, 336 U. S. 440, relied upon by appellant to support his argument is clearly distinguishable. There the object of the conspiracy to violate the White Slave Act had already occurred or passed at the time the alleged conversation attempted to be introduced into evidence

occurred. Not so in the instant case where the object of the conspiracy to obtain federally insured home loans was still actively being pursued by the appellant. In another important area the Kruelwitch case is distinguishable. In Kruelwitch the questionable conversation was "made in the petitioner's absence and the Government made no effort whatever to show that it was made with his authority." (p. 336 U. S. 442). The acts attributed to the appellant in this case were performed by him; no attempt was made to rely on any hearsay declaration made outside of his presence though attributed to him as was made in Kruelwitch.

The testimony at trial illustrates that the objective of the conspiracy to obtain FHA insurance on his home sales continued after March 1962.

Mr. George E. Glover, Vice President and Branch Manager of T. J. Bettes Co., testified that as late as May 1962 he went with the appellant to appellant's office where the witness copied information from Mr. Tripp's files relating to down payments, rental payments, and closing costs on home sales. Mr. Glover testified that he informed Mr. Tripp that this information was being obtained for the FHA. [R. T. 243-247]

Mr. Glover further testified that the part of the information obtained from the appellant in the early part of May 1962 was incorporated in a letter to the FHA dated May 11, 1962, regarding the application of Arnolfo Cardona to obtain an FHA loan. The closing paragraph of the May 11, 1962, letter expressly

indicates that as late as that date the FHA was still processing loans on buyers' applications containing false information which had been furnished by the appellant. [Exhibit 21] Mr. Glover also testified that Exhibit 21 represented only one of other similar letters sent to the FHA on the basis of information obtained from the appellant in May 1962.

As stated in Grunerwald v. United States, 353 U. S. 391 at p. 405:

> " ... a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime."

In the instant case the central objective of the conspiracy were of a continuing nature and were never attained.

As stated in United States v. Kissel, 218 U. S. 601 (1910):

> "[W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. ... If [the conspirators]

continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success." 218 U.S. at 607-8.

Here the plan was to obtain federally insured loans on defendant's properties. In order to successfully prosecute the plan to a successful conclusion, it was essential that defendant's records be conformed to those of the FHA and that defendant obtain the continued cooperation of the purchasers. Absent proper records and compliant purchasers, defendant's scheme would fail; that is, these acts were in pursuance of the plan. The conspiracy necessarily continued since the scheme had not been abandoned, nor was it yet a success.

VI

CONCLUSION

The evidence supports the conviction. No error was committed by the District Court in its rulings on the respective motions and admissibility of evidence, therefore, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT